Nos. 16-1424, 16-1435, 16-1474, 16-1482

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PENOBSCOT NATION; UNITED STATES, on its own behalf, and for the benefit of the Penobscot Nation,

Plaintiffs-Appellants/Cross-Appellees,

v.

AARON M. FREY, Attorney General for the State of Maine; JUDY A. CAMUSO, Commissioner for the Maine Department of Inland Fisheries and Wildlife; DAN SCOTT, Colonel for the Maine Warden Service; STATE OF MAINE; TOWN OF HOWLAND; TRUE TEXTILES, INC.; GUILFORD-SANGERVILLE SANITARY DISTRICT; CITY OF BREWER; TOWN OF MILLINOCKET; KRUGER ENERGY (USA) INC.; VEAZIE SEWER DISTRICT; TOWN OF MATTAWAMKEAG; COVANTA MAINE LLC; LINCOLN SANITARY DISTRICT; TOWN OF EAST MILLINOCKET; TOWN OF LINCOLN; VERSO PAPER CORPORATION,

Defendants-Appellees/Cross-Appellants,

EXPERA OLD TOWN; TOWN OF BUCKSPORT; LINCOLN PAPER AND TISSUE LLC; GREAT NORTHERN PAPER COMPANY LLC,

Defendants-Appellees,

TOWN OF ORONO,

Defendant.

Appeals from the United States District Court for the District of Maine

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BRIEF OF LAW AND HISTORY PROFESSORS AS *AMICI CURIAE* SUPPORTING THE PENOBSCOT NATION AND THE UNITED STATES

[continued on next page]

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INTEREST OF *AMICI CURIAE*

Amici curiae are a distinguished and diverse coalition of professors with expertise in Indian law and American history, with a particular focus on the history of early New England.

Gregory Ablavsky is Associate Professor of Law and (by courtesy) of History at Stanford Law School. He is the author of multiple articles and a forthcoming book on the history of federal Indian law and property in early America. In 2015, his work received the Cromwell Article Prize from the American Society for Legal History for the best article in American legal history published by an early career scholar.

Daniel R. Mandell is Professor of History at Truman State University. He is the author of six books specifically on Native Americans in New England during the period 1600–1900, including the document collection *New England Treaties North and West, 1650–1776*, volume 20 in the series *Early American Indian Documents: Treaties and Laws, 1607–1789*.

Jean M. O'Brien is Distinguished McKnight University Professor and Northrup Professor of History at the University of Minnesota. She is the author of several books on the history of the native peoples of New England, including *Firsting and Lasting: Writing Indians Out of Existence in New England* (2010) and *Dispossession by Degrees: Indian Land and Identity in Natick, Massachusetts,*

1650–1790 (1997). She has received the American Indian History Lifetime Achievement Award for 2014 from the Western History Association and is an elected member of the Society of American Historians.

Micah A. Pawling is an Associate Professor of History and Native American Studies at the University of Maine. His research interests include the ethnohistory of the Wabanaki (including Penobscot) peoples of northern New England and eastern Canada in the nineteenth century. Pawling's work has appeared in *Acadiensis*, *Ethnohistory*, and the *Historical Atlas of Maine*. His 2017 article received the 2018 Canadian Historical Association's prize for the best article in Indigenous history. As a recipient of the Whiting Public Engagement Fellowship, he collaborates with the Passamaquoddy Tribe of Indian Township (Motahkomikuk) on community history. His forthcoming book is on Wabanaki waterscapes in the nineteenth century.

Ian Saxine is Visiting Assistant Professor of History at Bridgewater State University. His 2019 monograph *Properties of Empire: Indians, Colonists, and Land Speculators on the New England Frontier* studies the history of relations between British colonists and Wabanaki peoples (including Penobscots) in early New England, focusing in particular on property rights and sovereignty.

Amici are submitting this brief in accordance with this Court's April 8, 2020 Order of Court inviting "[a]mici . . . to submit amicus briefs addressing the . . .

questions" posed in the Order.[1] Additionally, *amici* have received consent to submit a brief from all Plaintiffs-Appellants and Defendants-Appellees.

Counsel of record certifies that no counsel for any party has authored this brief in whole or in part or has contributed money intended to fund the preparation or submission of this brief. Counsel of record also certifies that no person other than counsel for *amici* has contributed funding for the preparation or submission of this brief.

[1] Order of Court at 4, *Penobscot Nation v. Frey*, Nos. 16-1424, 16-1435, 16-1474, 16-1482 (1st Cir. Apr. 8, 2020).

SUMMARY OF ARGUMENT

In determining the extent of the Penobscot Indian Reservation, this Court should consider the text and context of the original treaties concluded between Massachusetts and Maine and the Nation. Under these treaties, the Penobscot Nation unquestionably retained for itself title to, and an exclusive fishing right on, the adjacent submerged lands in the Main Stem of the Penobscot River.

ARGUMENT

I. INTRODUCTION

The Penobscot Nation (***Nation***) are a riverine people whose aboriginal homeland includes the Main Stem of the Penobscot River. The Nation has historically asserted its rights on the Main Stem, including its culturally vital practice of subsistence fishing.

In 1980, the Maine Indian Claims Settlement Act (***MICSA***)[2] and Maine Implementing Act (***MIA***)[3] (together, ***Settlement Acts***) resolved the Nation's claims to aboriginal homelands, defining the Penobscot Indian Reservation (***Reservation***) as comprising "the islands in the Penobscot River reserved to the Penobscot Nation

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[2] Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 1785.

[3] An Act to Implement the Maine Indian Claims Settlement, 1979 Me. Laws 2392 (codified as amended in Me. Rev. Stat. Ann. tit. 30, §§ 6201–14 (West 2019)).

by agreement with the States of Massachusetts and Maine."[4] Maine subsequently acknowledged that the Nation's reservation included both the islands themselves and a portion of the Main Stem.[5]

In 2012, Maine's Attorney General in an about-face stated that "the River itself is not part of the Penobscot Nation's Reservation" and that the Nation could only regulate activities such as fishing on the surfaces of the islands.[6]

Amici curiae believe that Maine's (new) position is fundamentally flawed for two main reasons. *First*, when determining the extent of the Penobscot Nation's Reservation, this Court should consider the text and context of the original treaties concluded between Massachusetts and Maine and the Nation (***Treaties***),[7] as these Treaties are expressly incorporated by reference into the

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4 *Id.* § 6203(8); MICSA § 3.

5 *See Penobscot Nation v. Mills*, 861 F.3d 324, 343–43 (1st Cir. 2017) (Torruella, J., dissenting) (noting statements of Maine officials accepting that the Nation's reservation included some portion of the surrounding riverbed).

6 J.A. 948–50.

7 The relevant treaties are: *Treaty Between the Penobscot and Massachusetts, August 8, 1796*, *in* 2 *Documents of American Indian Diplomacy* 1094, 1094 (Vine Deloria, Jr. & Raymond J. DeMallie eds., 1999) (***1796 Treaty***) [A-13 to -14]; *Treaty Made by the Commonwealth of Massachusetts with the Penobscot Tribe of Indians, June 29, 1818*, *in Acts and Resolves Passed by the Twenty-Third Legislature of the State of Maine, A.D. 1843*, at 253 (Augusta, Wm. R. Smith & Co., 1843) (***1818 Treaty***) [A-15 to -19]; *Treaty Made with the Penobscot Tribe of Indians, August 17, 1820, in Acts and Resolves*, *in id.* at 258 (***1820 Treaty***) [A-19 to -22] (collectively, ***Treaties***).

Settlement Acts (**I**). *Second*, under contemporaneous common law and prevailing conveyancing practice, the Nation, by reserving its title to the specified islands in the Treaties, also retained for itself title to, and an exclusive fishing right on, the adjacent submerged lands of the Main Stem (**II**).

II. THE TREATIES ARE PLAINLY RELEVANT TO THE INTERPRETATION OF THE SETTLEMENT ACTS

The Court should consider the text and context of the Treaties in resolving this appeal for at least two independent reasons. *First*, the Settlement Acts explicitly incorporate the Treaties by reference in defining the Reservation (**A**). *Second*, there is an ambiguity (if not inconsistency) in the panel majority's own interpretation of the Settlement Acts, and this ambiguity requires resort to the Treaties as relevant context (**B**).

A. The Plain Language of the Settlement Acts Makes Clear that the Treaties Are Relevant

The plain text of the Settlement Acts requires consideration of the Treaties because the statutory definition of the Reservation incorporates the Treaties by reference. Section 6302(8) of the MIA defines the Reservation to comprise

> the islands in the Penobscot River *reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine* consisting solely of Indian Island, also known as Old Town Island, and all

> islands in that river northward thereof that existed on June 29, 1818, excepting any island transferred to a person or entity other than a member of the Penobscot Nation subsequent to June 29, 1818, and prior to the effective date of this Act.[8]

As this Court previously recognized, the word "agreement" in the statutory definition designates the earlier Treaties that the Nation concluded with Massachusetts and Maine.[9] This follows from Congress's stated intent for the Nation to "retain as reservation[] those lands and natural resources which were reserved to [it] in [its] treaties with Massachusetts and not subsequently transferred by [it]."[10]

The Settlement Acts thus do not purport to alter the boundaries of the Reservation reflected in the Treaties. "Islands" is not a term first forged in 1980 by the MIA, nor should it be interpreted by reference to dictionaries alone. Rather, the MIA confirms and incorporates the Reservation demarcated in the Treaties themselves, i.e., anything that the Nation "reserved" to itself by its "agreement[s]" with Massachusetts and Maine at the turn of the nineteenth century. The express

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8 MIA § 6203(8) (emphasis added).

9 *See Maine v. Johnson*, 498 F.3d 37, 41, 47 & n.11 (1st Cir. 2007) (recognizing that the Settlement Acts define the Reservation in terms of "earlier agreements" from the eighteenth and nineteenth centuries between the Nation on the one hand and Massachusetts and Maine on the other).

10 J.A. 630, 692.

language of the Settlement Acts requires interpretation of the Treaties themselves.[11]

As a matter of textualism, therefore, the panel majority erred in holding that "we look only to the statutory text to understand the reservation's boundaries" because "[t]he treaties no longer have meaning independent of the Maine Settlement Acts," having been "subsumed within [them]."[12] This has things backwards. The MIA "subsumed" the Treaties by expressly incorporating them into the MIA, not by nullifying them. Because the text of the MIA makes the Treaties an integral part of the statutory definition of the Nation's Reservation, the Settlement Acts cannot be interpreted without reference to the Treaties they incorporate.

B. The Treaties Are Relevant to Resolving Ambiguity Concerning the Extent of the Reservation

In the alternative, the Treaties are relevant to resolving any ambiguity in the Settlement Acts concerning the extent of the Reservation and the Nation's associated statutory subsistence fishing rights.

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[11] This is a fundamental principle of statutory interpretation. *See, e.g.*, *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) ("When a statutory term is obviously transplanted from another legal source, it brings the old soil with it." (internal quotation marks omitted)).

[12] 861 F.3d at 333.

There is an undeniable ambiguity in the MIA as interpreted by the panel majority. The majority reads MIA section 6302(8) to exclude the Main Stem from the Reservation. Yet MIA section 6207(4) permits members of the Nation to "take fish, *within the boundaries of their . . . reservation*[], for their individual sustenance."[13] The Reservation does not include any fishable waters apart from the Main Stem.[14] The majority opinion thus implies two different interpretations of the term Reservation in the MIA: one excluding waters for fishing, the other including them. The majority opinion thereby contravenes the fundamental interpretive canon that the same term has the same meaning throughout a statute, absent a clear indication to the contrary.[15]

The panel majority rightly noted that evidence of party intent and historical context become "relevant . . . if the statutory language" is "ambiguous."[16] They nonetheless refused to analyze the ambiguity (if not inconsistency) between their reading of MIA section 6302(8) and the text of MIA section 6207(4) by taking into

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13 MIA § 6207(4) (emphasis added).

14 861 F.3d at 352.

15 *See, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570, (1995) ("[T]he normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning." (internal quotation marks omitted)).

16 861 F.3d at 334.

consideration relevant contextual evidence, including the Treaties.[17] That was error. If the MIA is to be read as a coherent whole, as it must,[18] then both uses of the word "reservation" should be consistent—or at least any difference explained with clear indications from the statutory context. The text of the key MIA provisions, read together, therefore requires consideration of the Treaties.

III. THE TREATIES RESERVE TO THE NATION THE SUBMERGED LANDS ADJACENT TO THE ISLANDS

According to the ordinary meaning of the terms of the Treaties at the time they were executed, the Nation unquestionably retained title to the submerged land of the Main Stem adjacent to the reserved islands.

Two background features of the law of the time inform this conclusion: a common-law rule presuming that the submerged land of a nontidal river, together with an exclusive fishing right, is the property of adjacent landowners (**A**); and the consistent practice of contemporary land conveyancing, which described land boundaries in terms that presupposed the application of the common-law rule (**B**). These two background features together help to reveal the ordinary contemporary

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[17] *See id.* at 333 (insisting that "[t]he ancillary reference to 'Indian reservations' . . . in section 6207(4) cannot dramatically alter the plain meaning of section 6203(8)'s definition of 'Penobscot Indian Reservation' " but providing no definition for the term "reservations" in section 6207(4)).

[18] *See, e.g.*, *United States v. Morton*, 467 U.S. 822, 828 (1984) (restating the canon that courts "read statutes as a whole").

meaning of the Treaties (**C**). That meaning is also supported by contemporaneous evidence of Penobscot interactions with state officials of Massachusetts and Maine (**D**).

A. The Common Law of the Time Presumed that Riparian Landowners Held Title to the Adjacent Submerged Land of a Nontidal River

English common law, as received by both Massachusetts and Maine, raised a presumption that title to submerged land lying underneath a stretch of river beyond the flow of the tide—such as the Main Stem, which is nontidal[19]—together with an exclusive right of fishing over that submerged land, was vested in the adjacent riparian landowners. This rule was clear and uncontroversial. It can be found in numerous common-law treatises and in case law from the decades around the turn of the nineteenth century.

Emblematic is the English treatise of Sir Matthew Hale, composed in the seventeenth century but first published in 1787. Hale distinguishes (i) tidal stretches of river, which constitute "arms of the sea" and belong to the Crown,[20] from (ii) nontidal, "fresh" river courses. Title to the submerged land beneath the

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19 *See Penobscot Nation v. Mills*, 151 F. Supp. 3d 181, 186 (D. Me. 2015) ("[T]he Main Stem is . . . non-tidal . . . .").

20 Matthew Hale, *A Treatise Relative to the Maritime Law of England* 10 (Francis Hargrave ed., [London], [n.p.], [1787]) [A-82].

latter, Hale explains, is presumptively held by adjacent landowners, who also hold the exclusive right of fishing over that land:

> Fresh rivers, of what kind soever, do of common right [i.e., at common law] belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the propriety of the soil, and consequently the right of fishing, *usque filum aquae* ['as far as the thread of the water']; and the owners of the other side the right of soil or ownership and fishing unto the *filum aquae* ['thread of the water'] on their side.[21]

This general rule, according to Hale, may be rebutted by contrary evidence, as title to the adjacent land, title to the submerged land beneath the river, and the right of fishing over the submerged land are distinct rights and may be transferred separately from one another. It is thus possible, he observes, that "one man may have the river, and others the soil adjacent; or one man may have the river and soil thereof, and another the free or several fishing in that river."[22] There is, however, a "common presumption" that the adjacent landowner enjoys both title to the submerged land beneath the river as far as the middle of the channel and the exclusive right of fishing over that submerged land.[23]

Other contemporary treatises either set the rule out in terms similar to Hale or go further and assert conclusively that title is vested in the adjacent landowners.

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21 *Id.* at 5 [A-80].

22 *Id.*

23 *Id.*

In an 1812 treatise on the English law governing hunting and fishing, Joseph Chitty does the former, simply quoting Hale's formulation of the rule.[24] Henry Schultes's *An Essay on Aquatic Rights*, published in 1811, does the latter, stating without qualification that nontidal stretches of river "are the property of the owners of the adjacent estates, and the ownership of soil extends to the middle of the stream . . . ."[25] According to Schultes, the right of fishing ordinarily goes with ownership of the submerged land.[26]

As for the case law, the leading *Case of the Royal Fishery of the Banne*, a decision of the Privy Council of Ireland concerning the right of fishing in a particular stretch of the River Bann in what is now Northern Ireland, also speaks of the submerged land and right of fishing as belonging conclusively to adjacent landowners, with no mention of a rebuttable presumption.[27] The court states that in any nontidal stretch of river, "and in the fishery of such river, the ter-tenants

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[24] 1 Joseph Chitty, *A Treatise on the Game Laws, and of Fisheries* 276–77 (London, W. Clarke & Sons, 1812) [A-72 to -73].

[25] Henry Schultes, *An Essay on Aquatic Rights* 95 (London, W. Clarke & Sons, 1811).

[26] *See id.* at 89 ("And if [an adjacent landowner] shall possess an estate only on one side of the water, it will be his own free tenement as far as the middle of the stream, and it will be his own fishery and right of fishing without any other person . . . .").

[27] *Case of the Royal Fishery of the Banne*, *in* John Davies, *A Report of Cases and Matters in Law, Resolved and Adjudged in the King's Courts in Ireland* 149–58 (Dublin, Sarah Cotter, 1762) [A-1 to -10].

[i.e., landowners] on each side have an interest of common right."[28] That the adjoining landowners' "interest of common right" in the river consists specifically of title to the submerged land under the river is made clear later in the opinion:

> [E]very inland river not navigable,[29] appertains to the owners of the soil, where it hath its course, and if such river runneth between two manors, and is the mear and boundary between them, the one moiety of the river and fishery belongeth to one lord, and the other moiety to the other . . . .[30]

This English common-law rule was received into the law of Massachusetts and Maine and remains part of the law of both jurisdictions today. In Massachusetts, the common law of England as it stood at the time of independence constitutes part of the law of Massachusetts except insofar as it has been abrogated by later enactment or judicial decision.[31] The post-independence Supreme Judicial Court of Massachusetts indicated its specific approval of the rule as early as

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28 *Id.* at 152 [A-4].

29 In the common law of the decades around the turn of the nineteenth century, the word "navigable" was equivalent to "nontidal"; as the Supreme Judicial Court of Maine has recognized, the term designated the portion of a river that lay upstream of the ebb and flow of the tide. *See Veazie v. Dwinel*, 50 Me. 479, 484 (1862) ("A river is deemed navigable in the technical sense of the term as high from the mouth as the tide ebbs and flows.").

30 *Case of the Royal Fishery of the Banne*, *supra*, at 155 (citation omitted) [A-7].

31 *Commonwealth v. Chapman*, 54 Mass. (13 Met.) 68, 68–69, 71 (1847); *see also Commonwealth v. Adams*, 125 N.E.3d 39, 45 (Mass. 2019).

1810,[32] and the rule has never since been repudiated or abrogated. In Maine, English common law also forms part of Maine law insofar as it was adopted by the colonists.[33] The Supreme Judicial Court of Maine has specifically affirmed that the rule in fact was adopted,[34] and it remains "well settled" in Maine law.[35]

B. Contemporaneous Conveyancing Practice Presupposed the Common-Law Rule

Late eighteenth- and nineteenth-century conveyancing practice in both England and America presupposed this common-law rule. Conveyancing instruments generally employed metes-and-bounds land descriptions that used watercourses to mark boundaries, but without expressly granting title to the submerged land underneath the watercourses and without specifying precisely

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[32] *See Storer v. Freeman*, 6 Mass. 435, 438 (1810) ("By the common law of England, which our ancestors brought with them, claiming it as their birthright, the owner of land bounded on a fresh water river owned the land to the centre of the channel of the river, as of common right . . . ."). The court expressly relies on Hale's treatise, confirming that it was understood to be authoritative. *See id.* at 439.

[33] *See Conant v. Jordan*, 77 A. 938, 941–42 (Me. 1910).

[34] *See Bean v. Cent. Me. Power Co.*, 173 A. 498, 499 (Me. 1934) ("Under the common law as recognized by Massachusetts Bay Colony, a proprietor's land, bounded on a stream, extended to the midthread of the current.").

[35] *In re Opinions of the Justices*, 106 A. 865, 868 (Me. 1919) ("Where lands border upon a nontidal stream . . . each of the riparian proprietors owns the fee in the land which constitutes the bed of the stream to the thread of the stream, 'ad medium filum aquae,' as it was anciently expressed, and if the same person owns on both sides he owns the entire bed, unless, of course, it is excluded by the express terms of the grant itself.").

whether a given grant of land extended to all or part of the designated watercourses. This practice thus assumed the existence of the common-law rule allocating title to the submerged land: if contemporaneous metes-and-bounds descriptions of the time were read so as to end property lines at rivers' edges, thereby excluding submerged land under nontidal rivers, the conveyances would leave ownership of submerged land unresolved—a result that is obviously impracticable and without foundation in the primary sources.

Among English sources, the English conveyancer Charles Barton offers evidence of this practice in the sample land descriptions he provides in his 1802 precedent book. In one long sample "indenture" of conveyance, Barton repeatedly uses rivers to bound parcels of land without specifying exactly where in each instance the boundary is to lie: at the river's near edge, at the centerline, or on the other side.[36] One parcel description in the example indenture refers to land as "bounded . . . on the part of the south by the river";[37] another refers to land "bounded on the east by the river running from — to —";[38] still another speaks of land "bounded . . . on the east by the river running from — towards— . . . and on

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[36] 5 Charles Barton, *Original Precedents in Conveyancing, Selected from the Manuscript Collection of John Joseph Powell, Esq.* 52–70 (London, W. Clarke & Sons, 1802) [A-23 to -41].

[37] *Id.* at 59 [A-30].

[38] *Id.* at 60 [A-31].

the east by the river there."[39] Neither these nor any other sample land descriptions in Barton's precedent book provides a more precise definition of the boundary line of a parcel lying along a river. Nor is this surprising: the background common-law rule made such precision unnecessary, because ownership of land abutting nontidal watercourses also carried with it ownership of the adjacent submerged lands.

This can also be seen in contemporary American sources. For example, in annotations to his 1803 edition of Blackstone's *Commentaries*, Virginia lawyer St. George Tucker recounts a similar manner of land description in a passage explaining common practices of land speculators in newly settled areas of American territory:

> Some rapacious land-mongers . . . had made their [land] entries by referring to some well known natural boundary, as from the mouth of one river to it's head, or where another river, or water course, united it's stream with the former, thence up the second river, to another well known point, from thence by a straight line of five, ten, or fifteen miles, to another water course, and down the same, to another well known point, and from thence by a straight line to the beginning, including all the lands within these limits . . . .[40]

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39 *Id.* at 61 [A-32].

40 3 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and*

Such descriptions can leave ownership of the referenced watercourses unresolved only because the issue is resolved by the common-law rule.

As particularly relevant in this appeal, in a deed from June 1805, Salem Town, a land agent acting on behalf of the Commonwealth of Massachusetts,[41] purported to convey several islands in the Penobscot River from the Commonwealth to a private buyer. The deed's description of the property being conveyed refers to the conveyed parcels only as "islands," with no explicit reference to submerged adjoining lands in the river. The deed conveyed in relevant part:

> all Islands lying in Old Town Falls so called, in the Penobscot River bounded & described as follows to wit, beginning at Island number four, thence to No. 5 which is the same Island which Winston's Mill dam is joined to, thence Easterly including the Islands number 5. 6. 7. 8. 9. 10. 11. and twelve to the East channel of the River containing about two acres of land . . . . Also Seven Islands lying in Penobscot River at a place called Stillwater or Norumsunkhungon Falls opposite the South end of Marshes Island, bounded & described as follows to wit, beginning at Island number one at the Main River between John Gordons and David Read junr.

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of the Commonwealth of Virginia app'x, at 69 (Philadelphia, William Young Birch & Abraham Small, 1803) (original spelling preserved) [A-129].

[41] *Wabanaki Homeland and the New State of Maine: The 1820 Journal and Plans of Survey of Joseph Treat* 21 & n.51 (Micah A. Pawling ed., 2007) [A-140].

> Mill dam, and is the same Island which their dam is joined to . . . .[42]

Notably, several of the islands were valuable to their purchasers largely because they served as fixed end points for mill dams that extended into the river.[43] This reinforces a construction of the deed that reads "islands" to include the submerged adjoining land over which mill dams could be constructed—again, consistent with the common-law rule.

In sum, the failure to include watercourses in the description of land boundaries and the practice instead of demarcating land boundaries by reference to watercourses reflect the fact that the common law already presumptively assigned title to the submerged land to the adjoining landowners. There was thus no need to specify the end point of riparian landowners' property more precisely.

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[42] Deed of Salem Town to Joseph Treat, June 17, 1805, bk. 22, p. 238, at 238, Hancock Cty. Registry of Deeds, Ellsworth, Me. [A-76].

[43] *See Wabanaki Homeland and the New State of Maine*, *supra*, at 21 [A-140] (explaining that the new owners of one of the deeded islands proceeded to build a mill dam from the island). An 1835 survey map used colored ink to mark areas on the islands of the Main Stem that were especially valuable for both mills and fishing. *See* Micah A. Pawling, *A "Labyrinth of Uncertainties": Penobscot River Islands, Land Assignments, and Indigenous Women Proprietors in Nineteenth-Century Maine*, 42 Am. Indian Q. 454, 461 (2018) [A-97].

C. When Interpreted Against the Contemporaneous Common Law and Conveyancing Practice, the Treaties Plainly Reserve to the Nation the Submerged Lands Adjacent to the Islands

When interpreted against this background—the common-law rule and contemporaneous conveyancing practice—the Treaties' references to "islands" unquestionably reserve to the Nation the adjacent submerged land under the Main Stem at least as far as the middle of the stream.[44] This conclusion is confirmed by the fact that the Treaties cede land using language that is typical of private-law conveyances of property. Their descriptions of land should therefore be read in accordance with the contemporaneous common law and practice of land conveyancing.

New England colonists had a long tradition of entering into treaties with native peoples that took the form of private deeds.[45] In keeping with this tradition, each of the Treaties employed the terms of private-law conveyance.

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[44] This conclusion is of course without prejudice to the *additional* arguments of the Penobscot Nation and the United States that the Penobscot Nation retained title to the entire submerged riverbed, from bank to bank.

[45] *See generally* Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* 10–43 (2005); Allan Greer, *Property and Dispossession: Natives, Empires and Land in Early Modern North America* 190–240 (2018); John Frederick Martin, *Profits in the Wilderness: Entrepreneurship and the Founding of New England Towns in the Seventeenth Century* 88–99, 266–69 (1991); Jean M O'Brien, *Dispossession by Degrees: Indian Land and Identity in Natick, Massachusetts, 1650–1790* (1997). Note that even in earlier eighteenth-century negotiations with members of the Penobscot Nation, British officials used language

The 1796 Treaty is styled an "Indenture" (i.e., deed) of conveyance,[46] recording that the Nation's representatives "do grant, release, relinquish and quit claim" the Nation's "right, Interest, and claim" to all the lands on both sides of the Penobscot River to Massachusetts, while reserving the islands listed above to the Nation.[47]

The 1818 Treaty similarly effects the "sale and conveyance"[48] of the Nation's "right, title, interest and estate"[49] in the rest of its territory on both sides of the Penobscot River to Massachusetts, and confirms that the Nation "shall have, enjoy and improve"[50] the islands to the north of and including Old Town Island.

The 1820 Treaty records the Nation's agreement to "grant, sell, convey" to Maine "[all its] right, title, interest and estate" in the lands that had been "sold and conveyed" to Massachusetts by the "indenture" of 1818.[51]

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associated with land conveyance. *See, e.g.*, 20 *Early American Indian Documents: Treaties and Laws, 1607–1789*, at 719 (Daniel R. Mandell ed., 2003) (reporting a mid-eighteenth-century negotiation at which British commissioners asserted to Penobscot representatives, "Your Forefathers many Years ago sold [certain lands] to the English, as appears by the Deeds we then produced to you, which Deeds you then appeared fully satisfied with").

46 1796 Treaty, *supra*, at 1094 [A-13].

47 *Id.*

48 1818 Treaty, *supra*, at 254 [A-16].

49 *Id.* at 253 [A-15].

50 *Id.* at 254 [A-16].

51 1820 Treaty, *supra*, at 259 [A-20].

The terms of private-law conveyance found in the Treaties accord with other Commonwealth documents that employ similar private-law language to describe Massachusetts's dealings with the Nation. A Massachusetts statute of 1786 speaks of the Nation holding its land "in fee,"[52] again indicating the Commonwealth's understanding that the Nation's title sounded in private law. Similarly, in an October 1786 address to the General Court, then-Governor of Massachusetts James Bowdoin spoke of the need to receive "a proper deed" to certain of the Nation's lands.[53]

Against this backdrop, the "islands" referenced in the Treaties should be interpreted in accordance with the common-law rule allocating title to submerged land under nontidal rivers and the contemporaneous practice of land description in conveyancing. Although none of the Treaties refers explicitly to the submerged land under the Penobscot River, that is because the reference to "islands" in these Treaties necessarily also encompasses the submerged land of the river around the islands. Indeed, if the common-law rule did not apply, it would follow that the Nation has *never* relinquished title to *any* of the submerged lands of the Main Stem, since none of the Treaties makes explicit mention of the bed of the Penobscot River at all.

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[52] Act of Oct. 11, 1786, ch. 31, 1786–87 Mass. Acts 70, 70 [A-11].

[53] Governor's Message of Oct. 4, 1786, ch. 7, 1786–87 Mass. Acts 938, 939 [A-78].

D. Contemporaneous Evidence of Penobscot Negotiations with Massachusetts and Maine Officials Supports This Interpretation

This interpretation of the Treaties as preserving the Nation's aboriginal title to the Main Stem is further supported by the contemporaneous evidence of Penobscot petitions to Massachusetts and treaty negotiations with Maine. That evidence demonstrates that the Nation repeatedly asserted its right to fish in the Main Stem of the Penobscot River, assertions consistent with its retention of title to the submerged lands adjacent to its islands. In a June 1797 executive address to the General Court, then-Governor of Massachusetts Increase Sumner reported that a delegation of Penobscot representatives had rightly complained to state officials of settler incursions that had "almost deprived them of the benefit of their Salmon Fishery."[54]

In 1820, the subject came up yet again during a treaty colloquy between the Nation and the new State of Maine. Penobscot Nation representative John Neptune protested: "The white people take the fish in the river so that they no get up to us. They take them with wares [i.e., weirs], they take them with dip nets. They are all gone before they get to us. The Indians get none."[55] Then-Governor of Maine

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[54] *Wabanaki Homeland and the New State of Maine*, *supra*, at 28–29 [A-147 to -148].

[55] *Id.* at 280 [A-179].

William King agreed that the protest was justified, replying that the Nation's complaint would be "attended to."[56]

Perhaps most explicit is the Nation's petition to the Maine Legislature in 1821 that refers to the Penobscot River with the possessive "our":

> [I]n the days of our fore Fathers the great plenty of fish which yearly came into the waters of *our Penobscot River* was one of the greatest sources by which they obtained their liveing . . . .
>
> But . . . our brethren the white Men who live near the tide waters of *our River* have every year built so many weares that they have caught and killed somany of the fish that there is hardly any comes up the River where we live so that we cannot Catch enough for the use of our families . . . .
>
> We have asked the general Court at Boston to make laws to stop the white people from building wares and they have made Laws but they have done as no good for the Fish grow more scarse every year—besides the weares they use a great many long nets[.] We can only very small nets and spears—now we ask you to make a Law to stop the white folks . . . .[57]

All of these assertions of a fishing right on the Penobscot River, from the 1790s to the 1820s, support an interpretation of the Treaties that reads "islands" as including the adjoining submerged lands of the river. The Nation's protestations, and state officials' responses, make clear that both sides understood the Nation to

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[56] *Id.* at 281 [A-180].

[57] Petition of John Neptune et al. to the Maine Legislature at 2, Jan. 26, 1821, Maine State Archives (emphasis added) [A-124].

have a right to fish in the river. Indeed, it is clear from these protests that the Nation's *primary reason for retaining the islands* was its belief that it would continue to hold the right to fish for its subsistence from the islands in the Main Stem.

IV. CONCLUSION

This Court conclude that the Penobscot Nation's title to the specified islands in the Treaties (as expressly affirmed in the Settlement Acts) also includes title to, and an exclusive fishing right on, the adjacent submerged lands of the Main Stem of the Penobscot River.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that this brief complies with the word limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,839 (five thousand eight hundred thirty-nine) words excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2020, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

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